No. 02-295

In the
SUPREME COURT OF THE UNITED STATES

William E. Gagnon, Jr.,

Petitioner,

v.

Sprint Corporation d/b/a Sprint, Sprint Spectrum L.P.
and Sprint Spectrum Finance Corporation d/b/a Sprint PCS,

Respondents.

On Petition for Writ of Certioriari
To The United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As a question of first impression, does the USERRA provide a lost wages remedy for employment discrimination against a uniformed services veteran?

2. As a question of first impression, does the USERRA provide for remedies in equity, upon a finding of liability for employment discrimination, regardless of whether monetary damages are awarded?

3. Once the court has determined that the plaintiff/veteran engaged in protected activity under the USERRA and may have incurred adverse employment consequences, is the finding of causation for a claim of retaliation exclusively left to the province of the jury?

(***Note:*** all questions relate to the Uniformed Services Employment and Reemployment Rights Act of 1994, Title 38 U.S.C. § 4301 *et seq.*, commonly referenced as "the USERRA").

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the United States court of Appeals for the Eighth Circuit, subject to any unknown or intervening changes in corporate structure for defendants/appellees. For the convenience of this Court, Petitioner has attached Sprint's, Defendants' Notice of Corporate Affiliations, filed in the United States District Court regarding this case. (App. 13).

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OPINIONS BELOW

1. William E. Gagnon, Jr. v. Sprint Corp. et al., 284 F.3d 839 (8th Cir. 2002). ***Memorandum Opinion***, Case No. 01-2505, filed March 19, 2002, attached at App. 1.

2. Gagnon v. Sprint Corp., (8th Cir.), Case No. 01-2505, ***Order Denying Petition for Rehearing and or Rehearing En Banc***, filed May 22, 2002, attached at App. 2.

3. Gagnon v. Sprint Corp., Case No. 99-0683-CV-W-1, United States Court for the Western District of Missouri Western Division, ***Order***, filed January 4, 2001, (trial court's order denying plaintiff, Gagnon's, Motion for Summary Judgement and granting defendants, Sprint's, Partial Motion for Summary Judgement). Attached at App. 3.

4. Gagnon v. Sprint Corp., Case No. 99-0683-CV-W-1, USDC W.D. Mo., ***Order***, filed May 10, 2001, (trial court's order granting defendants' Motion to Dismiss and entering Judgement as a Matter of Law). Attached at App. 4.

5. Gagnon v. Sprint Corp., Case No. 99-0683-CV-W--1, USDC W.D. Mo., ***Order***, filed February 4, 2002, (trial court's order for Gagnon to pay Sprint its attorneys' fees and costs). Attached at App. 5.

6. Gagnon v. Sprint Corp., Case No. 99-0683-CV-W-1, USDC W.D. Mo., ***Order***, filed July 15, 2002, (trial court's order vacating the court's prior award of attorneys' fees and costs to Sprint, due to Eighth Circuit reversal). Attached at App. 6.

JURISDICTION

This is a Petition for Writ of Certiorari, submitted in accordance with Supreme Court Rule 10 and pursuant to this Court's jurisdiction under Title 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Eighth Circuit issued its Opinion in, Gagnon v. Sprint Corp., 284 F.3d 839, on March 19, 2002. Both Appellant and Appellees submitted separate Petitions for Rehearing. The Eighth Circuit Court requested responsive briefs from the opposing parties on both Petitions. On May 22, 2002, the Eighth Circuit Court issued its Order Denying Petition for Rehearing and for Rehearing En Banc. This Petition for Writ of Certiorari is filed within ninety days of the issuance of the Eighth Circuit's Order on May 22, 2002, in compliance with Supreme Court Rule 13.3.

This Petition for Writ of Certiorari arises directly out of the interpretation and application of a federal statute, (the USERRA, Title 38 U.S.C. § 4301 *et seq.*), as a matter of federal question jurisdiction, Title 28 U.S.C. § 1331.

STATUTORY PROVISIONS

(Text of referenced statutes attached at App. 7; and excerpts of relevant Congressional Record at App. 8 and 9)

The Uniformed Services Employment and Reemployment Rights Act of 1994
"USERRA" Title 38 U.S.C. § 4301, *et seq.*

Sec. 4301. Purposes; sense of Congress

Sec. 4303. Definitions

Sec. 4311. Discrimination against persons who serve in the uniformed services and acts of reprisal prohibited

Sec. 4323. Enforcement of rights with respect to a State or private employer

STATEMENT OF THE CASE

A. Procedural Background

Petitioner, Gagnon's, case arises out of two sets of federal statutes protecting individuals against employment discrimination; USERRA, for veterans' protection; and the Civil Rights Act of 1964, Title 42 U.S.C. 2000e, for reverse discrimination as a white male, ("Title VII").

Prior to trial, Gagnon filed a motion for summary judgement, based upon direct evidence, for both his claims under USERRA and Title VII, and, Sprint filed a partial motion for summary judgement, seeking dismissal of the USERRA claims. The trial court denied Gagnon's motion, and granted Sprint's motion dismissing the USERRA claims. (App. 3).

Trial commenced on the Title VII claims. At the end of Gagnon's case, the trial court granted Sprint's motion for a judgement as a matter of law. (App.4). The trial court held this was not a direct evidence case.

Gagnon appealed both the USERRA and Title VII dismissals to the Eighth Circuit Court of Appeals. The Eighth Circuit reversed the trial court on the Title VII issues and held that, as a matter of law, Gagnon had submitted a direct evidence case and prevails on the issue of liability. The case was remanded on the issue of damages and Sprint's affirmative defenses to damages. (App. 1).

Further, the Eighth Circuit upheld the trial court on the dismissal of the USERRA claims. However, in doing so, the court held in favor of Gagnon on the legal standards at issue, but, *sua sponte*, held that the USERRA did not provide a wage-based damage for Gagnon; therefore, regardless of direct evidence of veterans' discrimination, Gagnon's USERRA claim was moot.

B. Facts

On January 31, 1997, Gagnon retired from the United States Army after serving more than 21 years. He retired as a Lieutenant Colonel. (Tr. 449, App. 11). For over thirteen years, his military duties involved administering and developing training management programs, including sophisticated computer-based training ("CBT"). (P's Ex. 267, App.12).

Sprint PCS hired Gagnon in March 1997 in a non-management capacity, with the stated anticipation that he was needed to fill a new position in management for CBT operations. (Tr. 448-455, App. 11). In October 1997, Gagnon was hired in the Training and Performance Support Department ("TAPS") as CBT-Manager.

Gagnon's management position was evaluated for compensation. The recommended salary had a market reference point ("MRP") of $66,000. Sprint's policy and procedure was to hire a

person within 15% of the recommended MRP. (P's Ex. 131, Tr. 821-24, 841, App. 12, 11). The acting director of TAPS, Lynn Meredith-Ball, recommended Gagnon's salary at 100% of the MRP. (Tr. 249, App. 11). The Human Resources Department recommended his salary at 85% of MRP, or the low end of the 15% of MRP policy. (Tr. 833-34, App. 11).

Meredith-Ball submitted the salary paperwork to Jim Mendenhall, as the Sprint Vice-President. Mendenhall said he was not going to approve either recommendation, stating, "I'm not going to pay him that, he's a white guy, isn't he? . . .If he were a woman or a minority, I would have to pay him, but I don't have to pay him." (Tr. 252-54, App. 11).

In the meantime, additional evidence of veterans' discrimination was developed, including discrimination directed at Gagnon. In October 1997, a member of management interviewed two job applicants with military backgrounds and stated:

> I provided my notes regarding the two candidates I interviewed yesterday in a previous e-mail. The following is a list of things to think about. Both candidates are career military. Both have worked or currently work for the same company, Logicon, so have very similar backgrounds as far as type of experience since leaving the military. I believe Bill Gagnon has also worked for the same organization. That would make three people with the same basic background in the training organization. Diversity is critical for an organization to grow and thrive. Different skill sets, different backgrounds and experiences are essential in a well-rounded training organization. The organization should reflect the environment in which it is providing training. Hope this helps. Thanks.

(Tr. 228-30, P's Ex. 16, App. 11, 12). Meredith-Ball reported that such practice and comments could create discrimination. Meredith-Ball was then verbally reprimanded for her report and statements. (Tr. 230-34, App.11).

Regarding Gagnon's initial salary as a CBT-manager, Gagnon had the highest MRP ranking and was paid $10,000 less than the next closest manager in the Kansas City, TAPS department. (P's

Ex. 270, App. 12). Because Gagnon was not confident that his salary would be corrected, he filed an EEOC Charge of Discrimination for reverse discrimination in April 1998. (Tr. 477, App. 11).

In a manager's meeting on June 22, 1998, Kathleen Wilder, Director TAPS, stated there was a perception in the department that you had to be retired military to advance, together with the perception of unfair treatment. Further, Wilder admitted she was uncomfortable that some of her employees thought they were being treated differently because they were not military and Wilder personally told Gagnon that she was uncomfortable with the number of former military people in TAPS. (Tr. 312-13, 602, App. 11).

In late June or early July 1998, Gagnon told Wilder that he was planning on transferring from TAPS to another department within the Sprint organization. (Tr. 480, App. 11). On August 7, 1998, Meredith-Ball learned of potential positions that were opening up in another department and a group of employees, including Gagnon, discussed this information. (Tr. 306-13, App. 11).

On August 27, 1998, Gagnon was disciplined, by the issuance of a "written reminder." The discipline specifically prohibited Gagnon from obtaining a transfer or promotion without special approval. (P's Ex. 34, App. 12). The reminder also stated that in the August 7, 1998 discussion Gagnon had created the false perception that discrimination was occurring in the workplace and falsely stated that Wilder was uncomfortable with the number of former military people in TAPS. Gagnon denies having made such statements. (Tr. 494-95, App. 11).

In the meantime, Sprint's in-house counsel, Ellen Martin, responded to the EEOC on Gagnon's Title VII Charge. Sprint stated that Gagnon was not discriminated against because he was a white, male, because his lower salary was due to his experience being in the military:

> Gagnon's performance was acceptable in that he met or exceeded his supervisor's expectations and the objectives established for his position. While Gagnon is a valued employee, he did not have all of the necessary technical expertise for the management position to which he was promoted until the Company paid for his training. Nor did Gagnon have the same level of relevant or industry-related experience. As demonstrated by Gagnon's resume, the majority of his experience before Sprint PCS was in the military; his counterparts had extensive training experience within corporations.

(P's Ex. 95, p. 8, App. 12).

Wilder admits she did not know, nor did she inquire, regarding the depth and scope of Gagnon's prior CBT experience. (Tr. 666, App. 11).

Wilder refused to allow Gagnon to apply for transfers during the six-month, disciplinary probation, while others were allowed to apply for transfers and received such transfers or promotions. (Tr. 496, 688-90, App. 11). Eventually, Gagnon applied for approximately twenty different positions within Sprint and was not hired. (P's Ex. 268 (App. 12), refused by trial court, Tr. 514-16, App. 11).

Gagnon believes that he sufficiently presented a set of claims for discrimination and retaliation under the USERRA. Further, it appears that the Eighth Circuit believes direct evidence of USERRA discrimination exits. However, the Eighth Circuit, *sua sponte*, provided a statutory interpretation allowing the dismissal of Gagnon's USERRA claims on the premise that he did not have a damage remedy for lost wages. Gagnon believes this interpretation of federal law by the Eighth Circuit is in error and creates an important issue of public policy for this Court to address, as a matter of first impression, regarding the scope of remedies under the USERRA.

REASONS FOR GRANTING THE WRIT

I. This Case Raises Important Questions of Federal Law, as a Matter of First Impression, for the Protection of Military Veterans in Employment

This is a case of first impression under the USERRA. The Eighth Circuit opinion at issue effectively strips military veterans with any protection against employment discrimination. Only review by this Court will assist in resolving the statutory, remedial scheme of this federal law.

Historically, Congress has tended to provide amendments to the military veterans' protection laws following a major military campaign. These amendments address contemporaneous issues of added protections. This was true following the Gulf War with the passage of the USERRA in 1994.

The USERRA, for the first time, provided, in part, for a private cause of action for employment discrimination based upon the protected status of having served in the uniformed services of the United States of America.

Congress granted remedies for economic damage, monetary liquidated damages, in equity, attorneys' fees and costs of litigation, and waivers of fees and costs. Title 38 U.S.C. § 4323. (The remedial scheme is more similar to the Age Discrimination in Employment Act, Title 29 U.S.C. § 621 *et seq*., as opposed to the Civil Rights Act of 1991, Title 42 U.S.C. § 1981a).

In this case, the Eighth Circuit Court, *sua sponte*, upheld the dismissal of the USERRA claims based upon a legal theory that a military veteran is without a monetary damage remedy under USERRA, even when direct evidence of veterans' discrimination exists. This theory was not raised by any party or the trial court, nor was it briefed by either party. Additionally (1) the holding is in direct conflict with the remedial scheme stated in the statute; (2) the holding ignores Petitioner's specific plea for equitable relief; and, (3) is generally in conflict with this Court's prior holdings that

veterans' protection laws are to be given liberal reading to provide the broad protections for our veterans as intended by Congress.

Given the reality of current military actions involving the United States Armed Forces, it is more than reasonable to presume that USERRA will be invoked by military veterans in the immediate future, when employment discrimination arises based upon an individual's military status.

Leaving the Eighth Circuit Court's holding intact, without review by this Court, will only lead to significant confusion on the scope of remedies available to veterans discriminated against.

II. The Language of the USERRA and the Legislative Record Indicate That the Term "Benefit of Employment" Provides a Monetary Damage Remedy (i.e., Lost Wages) for Victims of Veterans Discrimination Such As Gagnon

Discrimination under the USERRA is established under the framework laid out in § 4311(a):

> "A person who is a member of...[or] has performed...in a uniformed service shall not be denied initial employment, reeeployment, retention in employment, promotion or any benefit of employment by an employer on the basis of that membership...."

Ruling *sua sponte*, the Eighth Circuit held that Gagnon could not seek a remedy for lost wages under the USERRA, and, therefore, he is without a claim – even if he was discriminated against. The Eighth Circuit ruled that the term "benefit," as defined by the USERRA, specifically excludes wages or salary for work performed. 38 U.S.C. § 4303(2)[1]; see Gagnon v. Sprint Corp., 284 F.3d 839, 853 (8th Cir. 2002).

Gagnon asserts the Eighth Circuit misinterpreted the remedial scheme of the federal law, available to military veterans, who are subject to employment discrimination.

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[1]Section 4303(2) states in pertinent part: "The term 'benefit,' 'benefit of employment,' or 'rights and benefits' means any advantage, profit, privilege, gain, status, account or interest (other than wages or salary for work performed)..."

The USERRA remedial scheme is spelled out at § 4323(d), (e) and (h):

> **(d) Remedies.**–(1) In any action under this section, the court may award relief as follows:
>
> (A) The court may require the employer to comply with the provisions of this chapter.
>
> (B) The court may require the employer to compensate the person for any loss of wages **or** benefits suffered by reason of such employer's failure to comply with the provisions of this chapter.
>
> (C) The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) as liquidated damages; if the court determines that the employer's failure to comply with the provisions of the chapter was willful.
>
> (2)(A) Any compensation awarded under subparagraph (B) or (C) of paragraph (1) shall be in addition to, and shall not diminish, any of the other rights and benefits provided for under this chapter.
>
> . . . . .
>
> **(e) Equity powers.**–The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter.
>
> . . . . .
>
> **(h) Fees, court costs.**–(1) No fees or court costs may be charged or taxed against any person claiming rights under this chapter.
>
> (2) In any action or proceeding to enforce a provision of this chapter by a person under subsection (a)(2) who obtained private counsel for such action or proceeding, the court may award any such person who prevails in such action or proceeding reasonable attorney fees, expert witness fees, and other litigation expenses.

(Emphasis added). The clear reading of the remedial section of the USERRA should be sufficient, standing alone, to establish the need to review the Eighth Circuit opinion upon a writ of certiorari, to determine the remedial scope of the USERRA.

Further, as remedial legislation, the USERRA is to be "interpreted liberally," and , "broadly construed." H.R. Req. No. 103-65, at 19, 23 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2452, 2456 ("the act is to be liberally construed"). Echoing the legislative record, and as a matter of strong public policy, this Court has specifically held that the veteran's protection laws are to be "broadly" interpreted and "liberally construed." See Alabama Power Co. v. Davis, 431 U.S. 581, 584 (1977); McKinney v. Missouri - K.-T.-R. Co., 357 U.S. 265, 270 (1957); Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U.S. 275, 285 (1946). The USERRA, and more specifically the scope of the term "benefit of employment," must therefore be interpreted to provide Gagnon a remedy in accordance with the fundamental principle of statutory interpretation that remedial legislation be given a "liberal construction to effectuate its statutory purpose." See Hull Co. v. Hauser's Foods, Inc. 924 F.2d 777, 782 (8th Cir. 1991). That purpose is to protect veterans from employment discrimination and to provide monetary and remedial relief if discrimination occurs. Otherwise, to interpret the USERRA any less broadly circumvents its remedial scheme. See Boys Mkts. v. Retail Clerks Union Local 770, 393 U.S. 235, 250, 90 S. Ct. 1583, 1592, 26 L.Ed.2d 199, 210 (1970) ("[s]tatutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of the pertinent law and the policies that inspired ostensibly inconsistent provisions").

The starting point for interpreting a statute is its plain language, which should be conclusive absent contrary legislative intent. See Kaiser Aluminum and Chem Corp. v. Bonjorno, 494 U.S. 827, 835, 110 S. Ct. 1570, 1575, 108 L.Ed.2d 842, 852 (1990) (emphasis added). In other words, if the statute's legislative history contradicts its alleged plain meaning, the plain meaning does not control. See United States v. Stewart, 104 F.3d 1377, 1388 (D.C. Cir. 1997) ("while plain language of statute is an important guide, manifest intent prevails over the letter") (quoting In Re Nofgiger,

925 F.2d 428, 434 (D.C. Cir. 1991)). The remedial provision, § 4323(d), specifically provides a remedy for, "any loss of wages or benefits. . . ." Regardless of any definition of "benefits," under § 4303(2), the statute states a remedy for "any loss of wages." Beyond that clear reading, the legislative intent still shows the error in the Eighth Circuit's, *sua sponte*, interpretation.

Specifically, the official United States Senate Report No. 103-158, (See 1993 WL 4325676, p. 38 (Leg. Hist.)), defines the parenthetical clause at issue in § 4303(2) and describes its meaning as follows:

> "other than wages or salary for work **not performed** while absent from employment"

As stated by the same Congress that drafted the legislation at issue, the parenthetical language is simply an indication that while various benefits continue to accrue during leave periods, the employer is not obligated to pay the wages or salaries of a potentially aggrieved employee for unworked hours while on military leave status (whereas a claimant is entitled to monetary damages for discrimination arising from work he or she did perform). The Senate Report accurately states the explanation of the definition, without any uncertainty, because it is preceded with the actual language of the statute and is raised as an interpretive comment, not as an amendment.

The combined House Report No. 103-65, which also addresses the USERRA currently in place (See Cong. Record Vol. 139 (1993) and Cong. Record Vol. 140 (1994), excerpts, App. 9), likewise calls for the inclusion of wages and salaries in the remedial scheme of the USERRA. Clarifying its intent as to § 4311, (the underlying and primary provision establishing the framework for USERRA discrimination claims), House Report No. 103-65 explains that a monetary remedy exists if an USERRA discrimination claim is established:

"If the employee is unlawfully discharged under the terms of this section prior to leaving the military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, and processing of the claim should not wait completion of the service, even if only for lost wages."

"Section 4322(d)(2) provides that the courts are empowered to require employers to comply with the provisions of this chapter, to compensate the employee for any loss of wages or benefits, and to award monetary damages in the case of willful violations." *(Note: § 4322 became § 4323 in the final version of the Statute.)*

Cong. Record, p. 2471, P.L. 103-353, p. 38.

* * * * *

"To the same effect, the payment of back wages or lost benefits, by itself, does not constitute prejudice in the laches context....In terms of the monetary remedies awarded under chapter 43, the principal that lost wages or other benefits lost because of violations of chapter 43 are to be calculated on a pay period by pay period basis is hereby affirmed, [*citations omitted*], which hold that a veteran or reservist does not waive his or her rights under the act by refusing an offer of redeployment which extends anything less than full statutory guarantees, including proper seniority, position, pay and lost wages and benefits."

Cong. Record, p. 2472, House Report No. 103-65, p. 39.

* * * * *

"Current law, under Section 4302, in the case of a private or state employer who fails or refuses to comply with the re-employment laws [USERRA], (1) the District Court of the United States for the district in which the employer maintains a place of business, exercises authority or carries out its function, has the power, upon the filing of a motion, petition, or other appropriate pleading by the individual entitled to the benefits of the re-employment law and to compensate the individual for any loss of wages or benefits suffered by reason of the employer's unlawful action;....(8) if the District Court determines

> that the employer's failure to comply with the provisions of Chapter 43 were willful, the court may require the state or private employer to pay, in addition to the compensation determined to be paid the person, an amount equal to that compensation as liquidated damages." (emphasis added)

Cong. Record, p. 2508, P.L. 103-353, Explanatory Statement, Enforcement.

* * * * *

> [Federal government as employer]...to issue an order requiring compliance and to compensate the individual for any loss of salary or wages suffered by reason of failure to comply plus any amounts received by the individual through other employment."

Cong. Record, p. 2509, Explanatory Statement.

Denying Gagnon the ability to obtain monetary relief for lost wages and salary as a victim of USERRA discrimination undermines the USERRA's purpose to provide relief for such unlawful, discriminatory conduct. See Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286, 133 L.Ed.2d. 258 (1995) (elementary rule of construction that act cannot be held to destroy itself); In Re Windsor on the River Assoc. Ltd., 7 F.3d 127, 130 (8th Cir. 1993) (task of federal courts is to interpret statute in light of purposes Congress sought to serve.)

Further, as a matter of public policy, the Eighth Circuit's opinion has the effect of giving employers *carte blanche* to discriminate against a military veteran without fear of economic reprisal.

In briefs on Petition for Rehearing, Sprint argued that USERRA's legislative history from 1991 corroborates the exclusion of wages for work performed under the definition of "benefit of employment." However, such legislative history predates the Congressional record of the governing legislation. More importantly, the 1993 and 1994 House and Senate Reports relied upon by Gagnon encapsulate the Congressional intent for the current version of the USERRA, and for that reason, best represent the legislative intent for the remedial scheme at issue. See United States v. Vig, 167

F.3d 443, 448 (8th Cir. 1999) (it is the intent of the Congress that enacted the section that controls for purposes of statutory construction).

Petitioner suggests the specific, remedial language of the statute, along with the legislative record, clearly demonstrate that veterans, who suffer discrimination on the job, are entitled tc monetary damages under the USERRA in the form of lost wages and salary. Review of the remedial scope of the USERRA, by this Court, will appropriately advance public policy needs to define the scope of protection afforded our military veterans.

III. The USERRA Expressly Provides for Equitable Relief Regardless of the Award of Any Monetary Damages for Lost Wages.

The broad and comprehensive, equitable remedies a court may utilize, upon a finding of USERRA discrimination, are set forth in §§ 4323 (d) (1)(A) and (e).

The trial court, inherently, has the ability to issue equitable remedies upon a finding of discrimination under the USERRA.

However, in this case, Gagnon specifically requested equitable relief under § 4323. Gagnon's Complaint made the following prayer, in part, in the first count alleging veteran's discrimination:

> WHEREFORE, Plaintiff prays the Court:
>
> (d) Order Defendants to comply with the Veteran's Rights Act as to Plaintiff and other employees and prospective employees; develop a written compliance program subject to court approval which includes, but is not limited to, policy revisions, training programs, affirmative action and recruiting, a retraining program for veterans to gain specific telecommunications workplace skills consistent with the veteran's skills and background, public postings in the

workplace of non-compliance violations and strategies to provide compliance, provide for a veteran's liaison who shall report to the Court, provide policies and actions to appropriately deal with employees and representatives of Defendants who engage or have engaged in discriminatory conduct, and to provide notice to the United States government and each office of the United States Armed Forced notifying them of the non-compliance and advising of the strategies to provide compliance.

(f) Grant such affirmative or equitable relief as the Court may deem just and proper.

(See App. 10).

Direct evidence supports Gagnon's claim of USERRA discrimination. Upon such a showing, liability is established. Gagnon should be afforded equitable relief, regardless of monetary damages.

Kathleen Wilder's written statement to in-house counsel stated:

> **He [Gagnon] was brought in about $1,000 less[2] than his peers based upon the lack of business experience. Most of his experience was in the military and his counterparts had extensive training within corporations.** (P's Ex. 4).

Sprint's EEOC response to Gagnon's Title VII EEOC Charge of Discrimination states Gagnon was paid less, **because** he is a military veteran:

> **"Nor did Gagnon have the same level of relevant or industry related experience. As demonstrated by Gagnon's resume, the majority of his experience before Sprint PCS was in the military; his counterparts have extensive training experience within corporations."** (P's Ex. 95; Tr. 638, App.12, 11).

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[2] Wilder's personally drafted statement reads $1,000. (P's Ex. 4, App. 12). This, however, is a typographical error. P's Ex. 270, Tr. 661, App. 12, 11, shows Gagnon's pay was actually $10,000 less than the next, closest peer. Further, Wilder admitted she did not know the scope of Gagnon's CBT experience or skills in the military or compared to any other person. (Tr. 666, App. 11).

Thus, Sprint's proffered, "same decision" defense to the Title VII claim was a direct acknowledgment of veteran's discrimination against Gagnon.[3] For the courts to allow Sprint to defend itself against one claim of discrimination, based upon an admission of another, co-existing, act of discrimination (without remedy) turns justice and the employment discrimination laws on their heads.

Apparently recognizing the direct evidence of USERRA discrimination, the Eighth Circuit ruling completely overlooked the need for the courts to implement equitable relief for the underlying purpose of the anti-discrimination laws – to eliminate illegal discrimination in the workplace.

The scope of equitable remedies, under the USERRA, also raises an important interpretation of federal law for this Court to review upon a writ of certiorari.

IV. A Jury Must Determine Whether Gagnon Has Sufficiently Established Causation to Entitle Him to Relief for USERRA Retaliation.

The Eighth Circuit ruling reversed the trial court, finding that Gagnon had not violated any Sprint policies, and that Gagnon had properly raised his complaints of retaliation and engaged in protected activity under the USERRA.

Nonetheless, the Eighth Circuit still upheld the district court's grant of summary judgment on the USERRA retaliation claim, concluding that Gagnon failed to establish causation:

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[3] Offering Gagnon's military background as a defense to paying Gagnon a lower starting salary as CBT manager (which prompted Gagnon's April, 1998 EEOC charge of Title VII discrimination) is akin to the following response to allegations of gender discrimination – "The lower salary wasn't because she was a female, it was because she was Jewish." See P's Ex. 4 and 95, App. 12.

> "Our review of the records suggests that there is no evidence connecting Gagnon's internal complaints of discrimination and the issuance of the written reminder following the meeting held outside of the department by Gagnon and Meredith-Ball.

See Gagnon, 284 F.3d at 855.

The causation evidence proffered by Gagnon gives rise to conflicting inferences sufficient to raise material fact issues necessitating resolution by a jury. See Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 120 Sup. Ct. 2097, 2110 (2000) (credibility determinations, weighing of evidence, drawing of legitimate inferences "are jury functions, not those of a judge"); Ryther v. KARE 11, 108 F.3d 832, 845 (8th Cir. 1997) (where conflicting inferences reasonably can be drawn from the evidence, it is the function of the jury to determine what inferences shall be drawn); Dace v. ACS Indus, Inc., 722 F.2d 374, 377 (8th Cir. 1983) ("When questions of fact are involved, common sense is usually more important than technical knowledge, and 12 heads are better than one.")

As determined by the Eighth Circuit in this case, the appropriate standard of proof for an USERRA retaliation claim is the so called "but for" test, and the burden of proof is on the employer once the employee's case is established. See Gagnon, 248 F.3d at 853 (citing Sheehan v. Dept. of Navy, 240 F.3d 1009, 1013 (Fed. Ct. 2001)). As the Eighth Circuit further clarified, the procedural framework and evidentiary burdens laid out in the USERRA shift the burdens of persuasion and production to the employer if the plaintiff shows that his or her military status was at least a motivating factor in the employer's action. See Gagnon, 284 F.3d at 854 If the plaintiff makes such a showing, the employer prevails only if it proves by a preponderance of the evidence that the challenged action would have been taken despite the veteran's protected status. Id.

"Motivating factor" means that if the employer was asked at the moment of the decision what its reasons were for the challenged decision and it gave a truthful response, **one** of those reasons would be the employee's military position or related obligations. See Robinson v. Morse Chevrolet-Buick, Inc., 974 F. Supp. 571, 578 (E.D. Tex. 1997) (emphasis added) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250, 109 Sup. Ct. 1775, 1790, 104 L.Ed. 2d 268 (1989) (the motivating factor need be only one reason for the challenged decision; not the sole "true," or "principal" reason.) Accordingly, to create a material issue of disputed fact as to causation, Gagnon need only present evidence giving rise to the reasonable inference that Gagnon's veteran's status was at least one of the reasons for the alleged retaliatory acts committed by Sprint.

The Eighth Circuit held that Gagnon engaged in protected activity under the USERRA. Further, the Eighth Circuit determined that the written reminder, "may constitute an adverse employment action," (See Gagnon, 284 F.3d at 855). Additional, uncontroverted facts give rise to numerous inferences which create material issues of fact regarding causation that must be determined by a jury. It was undisputed that Wilder previously knew Gagnon was seeking transfer, that Gagnon made transfer requests while the written reminder was in effect and thereafter, and Sprint denied every request. (Tr. 508-09, P's Ex. 50, App. 11, 12.) The fact that the written reminder was placed in Gagnon's personnel file at the disposal of Sprint hiring managers raises a reasonable inference as to Sprint's retaliatory motive behind the transfer denials. Even Sherry Gilligan, (the Vice-President, who Sprint holds out as the decision maker on whether Gagnon was retaliated against), testified she had hired, "hundreds of people within the Sprint organization," and knowing an applicant was on corrective action would negatively influence her hiring decision. (Tr. 988, 990, App. 11). In fact, Gilligan never hired anybody that had been on corrective action for

alleged work-related misconduct. (Tr. 990, App. 11). The fact that other employees were given transfers out of the CBT department, some of which had been with Sprint less than a year, in contrast to its alleged policy disallowing such transfers, bolsters the inference of a causal link between Gagnon's complaints of veterans' discrimination and the issuance of the written reminder. See Gagnon, 284 F.3d at 851 ("Papering" an employee's file with negative reports and reprimands may sufficiently support a claim of retaliation if they adversely affect or undermine an employee's position.") (quoting Kim v. Nash Finch Co., 123 F.3d 1046, 1060 (8th Cir. 1997)).

The disciplinary action of the written reminder is specifically directed at Gagnon's reported concerns of USERRA discrimination, and directly establishes the causal connection between his reporting of USERRA discrimination and the retaliatory events. At a minimum, and all that need be established to avoid summary judgment, a reasonable jury could infer that Sprint issued Gagnon the written reminder for his complaints of veteran's discrimination. Gagnon complained, and Sprint subsequently punished him for such complaints with a retaliatory motive, as illustrated by the written reminder itself:

> "You have created a false perception that discrimination is occurring in the workplace. Not only do your actions put the company at risk for something that is absolutely not true...."

Viewing the evidence as to causation in a light most favorable to Gagnon demonstrates that the inconsistent inferences arising from the conflicting evidence demands resolution by a jury. See Thorne v. Welk Inv., Inc., 197 F.3d 1205, 1211 (8th Cir. 1999) (when evidence presents "inconsistent inferences", resolution of "conflicting evidence was a matter for the jury to resolve").

Sprint did not investigate Gagnon's complaints of veterans' discrimination. This fact, alone, creates a reasonable inference for a jury to consider. Sprint was without complete and accurate

information to back up the statement in the written reminder that Gagnon's discrimination complaints were "absolutely not true". If Sprint conducted no investigation into alleged veterans discrimination, how could it conclude Gagnon had created the "false perception that discrimination is occurring in the work place"? A reasonable jury could infer that the written reminder was issued for retaliatory reasons.

This case presents the issue of first impression for this Court to establish the standards for a retaliation claim under the USERRA.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed by first-class United State mail, postage prepaid, this 20th day of August, 2002, to:

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